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MEMORANDUM

TO: Mayor Satya Rhodes-Conway and Alders

FROM: Michael Haas

DATE: September 28, 2020

RE: Shadayra Kilfoy-Flores

As I previously indicated, on September 15, 2020, the City received a sworn complaint from Shadayra Kilfoy-Flores seeking the removal of Alder Paul Skidmore from the Common Council. The Complaint is attached. This memorandum outlines the requirements under Wisconsin law for processing the complaint.

The Complaint

The Complaint states that Ms. Kilfoy-Flores was recognized by the Mayor to provide public comments at the September 1, 2020 Common Council meeting. The Complaint alleges that, immediately after she was called upon, Alder Skidmore uttered a vulgar slang term that was directed at her. The concluding paragraph of the Complaint states:

It is for this reason that I PERSONALLY DEMAND that you, Mayor Satya Rhodes Conway and the Madison Common Council, to censure the individual responsible, who appears to be Alder Skidmore, and for you to join me in my demand for his resignation. This is my notification of a FORMAL complaint to begin the process of accountability.

Because the complaint does not specifically mention a public hearing to consider removal of Alder Skidmore from the Council or cite the applicable statutes, I contacted Ms. Kilfoy-Flores to determine whether she intended to seek Alder Skidmore's removal. She confirmed that this was her intent and she wished to initiate the process for the Council to consider his removal.

Applicable Statutes

The applicable law regarding removal of a Council member is found in Chapter 17 of the Wisconsin Statutes. Wis. Stat. § 17.12 provides that an elective officer of a city may be removed by the common council, for cause. Wis. Stat. § 17.001 defines “cause” as meaning “inefficiency, neglect of duty, official misconduct, or malfeasance in office.” Wis. Stat. § 17.12(1)(d) states that removals by the common council may be made only by an affirmative vote of three-fourths of all the members thereof. . . .”

The mechanics of considering the removal of an Alder are established in Wis. Stat. § 17.16. The text of the complete Statute is attached. Removal may be made only upon written verified charges brought by a resident taxpayer of the City, and after a speedy public hearing at which the Alder shall have full opportunity to be heard to present a defense against the charges, personally and by counsel. A copy of the charges and written notice of the hearing must be provided to the Alder at least 10 days prior to the hearing. The Alder may file a verified answer within 10 days of receiving the charges. *Wis. Stat. §17.16(3)*.

Wis. Stat. § 17.16(3) also states that the hearing “shall be conducted and investigation made by the removing power with due dispatch.” The entire Council is considered to be the removing power. Under Wis. Stat. § 17.16(5) each member of the Council is authorized to administer oaths and to issue subpoenas for the attendance of witnesses and the production of evidence, and may make and enforce orders and rules necessary to properly conduct the hearing, and may appoint and fix the compensation of a stenographer to take testimony. Finally, Wis. Stat. § 17.16(7) provides that no person may be excused from testifying or providing evidence for the reason that doing so may tend to incriminate them.

The Council may require the person filing a complaint to execute and deliver a bond in the sum of \$1,000. The bond is intended to ensure potential payment of all costs and expenses actually incurred by the City that are necessary to conduct the hearing and any investigation of the charges. *Wis. Stat. § 17.16(4)*. The expenses for the process are paid for by the City, but if the Common Council finds that the Complaint was willful and malicious and without probable cause, all such expenses shall be paid by the person who files the Complaint. *Wis. Stat. § 17.16(9)*.

In the case of removal, an order and complete transcript of the testimony and proceedings and a statement of the cause for removal must be filed with the City Clerk. *Wis. Stat. § 17.16(8)*. A person lawfully removed from office is ineligible to be appointed or elected to fill the vacancy caused by the removal. *Wis. Stat. § 17.16(10)*.

Next Steps

There is little to no case law regarding the specifics of the procedures outlined in Wis. Stat. § 17.16 and public hearings to consider removal of an Alder are rare in Wisconsin, so there is not a well-established blueprint to follow. Based upon the Statutes and basic principles of due process, our Office recommends the following steps and decision points for the Council.

1. The Council should consider whether to hold a public hearing by voting on a resolution or motion. The statute appears to require a public hearing if verified charges are filed but the Council must still determine whether and when a hearing would be held. If the Council determines a hearing will be held, it should be mindful of the directive to hold a speedy public hearing. Alternatively, the Council could

determine that no public hearing will be held because the Complaint does not establish probable cause that removal is warranted; in other words, even if the charges in the Complaint are proven, they do not constitute “inefficiency, neglect of duty, official misconduct, or malfeasance in office.”

We recommend holding any public hearing separate from regular Council meetings given the logistical and time requirements. We also recommend considering multiple hearing dates be scheduled as close together as possible to ensure there is sufficient time to complete the process.

2. If the Council orders that a public hearing be held, it should also direct the following specific steps:
 - a. The City Attorney shall provide a copy of the Complaint to Alder Skidmore with instructions regarding the conduct of the hearing, including the opportunity to file an answer within 10 days of service of the Complaint, and the opportunity to present a defense at the hearing personally and by counsel.
 - b. Whether the Council will initiate any investigation of the incident prior to the public hearing, the scope of such investigation and who will conduct it.
 - c. The City Attorney and Finance Department shall be authorized to retain a stenographer to transcribe the testimony and proceedings.
 - d. Establish the specific process for the public hearing. To ensure basic due process, the hearing should include an opportunity for Ms. Kilfoy-Flores to present sworn testimony and evidence as well as for Alder Skidmore to do the same, and for each party to question opposing witnesses and present closing arguments.
 - e. Whether the Complainant will be required to execute and deliver a bond in the amount of \$1,000 as security for the payment of costs and expenses of the hearing in the event that the Council determines the Complaint was willful and malicious and without probable cause.
 - f. Identify the individual who will serve as the presiding officer for the public hearing, which may be the Council President, another member of the Council, or a separate hearing officer, such as a retired judge or an attorney familiar with evidentiary and procedural rules for adversarial hearings. The City Attorney may assist the presiding officer with procedural issues and questions.
 - g. The individual who will administer the oath to witnesses (likely the stenographer) and the method for each Council Member to exercise their right to issue subpoenas for the attendance of witnesses and the production of evidence. The City Attorney and Common Council staff can assist in drafting any subpoenas requested by Alders. Also, whether Alders will be permitted to ask questions of witnesses during the public hearing.
3. If a hearing is held, the Council should determine whether the Complaint’s allegations are proven and, if so, whether the actions that are alleged constitute cause for removal. If there is an affirmative vote of 15 members that the allegations

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are proven and constitute cause, Alder Skidmore would be removed from the Council. If there are not 15 votes in the affirmative, the Complaint would be dismissed. The Council could also entertain any other appropriate action. The Council may also determine whether the Complainant shall pay for the costs and expenses to conduct the hearing and any investigation pursuant to Wis. Stat. § 17.16(9).

In anticipation of consideration regarding a public hearing beginning at the Council meeting of October 6, 2020, our Office is drafting a resolution that can be introduced at that time and used as a vehicle for establishing the rules for a public hearing if the Council decides to proceed in that manner. Unless the rules are suspended, the resolution could be referred to the next Council meeting and if a hearing is ordered, the dates could be set at that time. Any Alder that wishes to propose specific provisions for a resolution or to be listed as a sponsor is invited to contact me. I am also available to discuss any questions regarding this information and process.

Wisconsin Statute Section 17.16

17.16 Removals: definition; procedure; disqualification

(1) Removals from office at pleasure shall be made by order, a copy of which shall be filed as provided by sub. (8), except that a copy of the order of removal of a circuit court commissioner shall be filed in the office of the clerk of the circuit court.

(3) Removals from office for cause under this chapter, except as provided in s. 17.14, shall be made as provided in this section, and may be made only upon written verified charges brought by a resident taxpayer of the governmental unit of which the person against whom the charges are filed is an officer, and after a speedy public hearing at which the officer shall have full opportunity to be heard to present a defense against the charges, personally and by counsel. A copy of the charges and written notice of the time and place for the hearing shall be given the officer by the removing power by delivery to the officer in person or by mailing the same to the officer at the officer's last and usual post-office address not less than 10 days prior to the hearing. The officer may within 10 days from service of the charges file with the removing power a verified answer thereto. The hearing shall be conducted and investigation made by the removing power with due dispatch, but in case of charges brought before the governor, the governor may appoint a commissioner to conduct the hearing, make the investigation and report the testimony and proceedings to the governor, and the council of any city having a membership of more than 20, in case of charges brought before it, may appoint a committee of not less than 5 of its members, to conduct the hearing, make investigation and report the testimony and proceedings to it. The commissioner or committee shall have the same power and authority as the governor or the council, as the case may be, in the conduct of the hearing on and investigation of the charges.

(4) The removing power may, before acting upon any charges preferred against any officer, require the person preferring the same to execute and deliver to such power a bond in the sum of \$1,000 with one or more sureties to be approved by such power, conditioned for the payment of all costs and expenses actually incurred by the state, county or other unit of which the person charged is an officer and by the removing power in the hearing and investigation of such charges.

(5) The removing power, and in case such power consists of more than one person, each such person is authorized to administer oaths and to issue subpoenas for the attendance of witnesses and the production of evidence, and may make and enforce such orders and rules as are necessary to properly conduct such hearing and may appoint and fix the compensation of a stenographer to take testimony thereat.

(7)

(a) No person may be excused from testifying or from producing evidence on the hearing for the reason that the testimony, documentary or otherwise, required of him or her may tend to incriminate him or her, but no person so testifying may be prosecuted for or on account of testifying or producing any documentary evidence, except for perjury committed in giving the testimony.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

(8) Removals from office for cause shall be by order, a certified copy of which, together with a complete transcript of the testimony and proceedings at the hearing and a statement of the cause or causes for which removal is made, shall be filed by the removing power as follows:

(a) In the case of a state officer, in the office of the secretary of state.

(b) In the case of other officers, in the office of the clerk of the unit of which the person removed was an officer.

(c) In the case of officers of joint county institutions, in the office of the county clerk of the county wherein the buildings of such institution are located.

(9) In the case of procedure for removals by the governor, all expenses incurred shall be paid upon vouchers duly certified by the governor and shall be charged to the appropriation provided in s. 20.525. In the case of procedure for removals by any other state officer or body, such expenses shall be paid out of the appropriation to the officer or body invested with power to remove. In case of procedure for removals by other officers or bodies, the expenses thereof shall be paid by the unit of government of which the person against whom charges are preferred was an officer. But if the removing power finds that the complaint was willful and malicious and without probable cause all such expenses shall be paid by the person who preferred the charges and may be collected in an action against the person or on the bond furnished by the person.

(10) A person lawfully removed from office shall be ineligible to appointment or election to fill the vacancy caused by such removal.